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No. 92-6073

**ORIGINAL**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ONE PARCEL OF PROPERTY LOCATED  
AT 508 DEPOT STREET, GARRETSON,  
MINNEHAHA COUNTY, SOUTH DAKOTA,  
WITH ALL APPURTENANCES AND  
IMPROVEMENTS THEREON, and  
ONE 1972 HMET MOBILE HOME WITH  
SERIAL NUMBER 0356509G,  
WITH ALL APPURTENANCES AND  
IMPROVEMENTS THEREON,

Supreme Court, U.S.  
FILED

SEP 30 1992

OFFICE OF THE CLERK

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

**RECEIVED**

SEP 30 1992

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ON WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

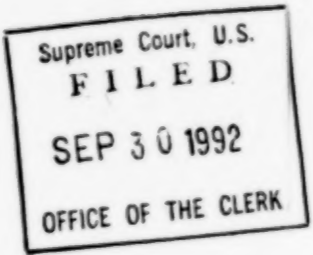
PETITION FOR CERTIORARI

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THE UNITED STATES

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PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

Comes now Richard Lyle Austin, Petitioner herein, by and  
through his attorney, Richard L. Johnson, and for his Petition for  
Writ of Certiorari to the United States Court of Appeals for the  
Eighth Circuit represents and shows to this Court the following:

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE CONCEPT OF PROPORTIONALITY ARISING FROM THE  
EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD BE  
APPLIED TO THE FORFEITURE OF THE ABOVE-DESCRIBED PROPERTY FROM  
RICHARD LYLE AUSTIN, THE OWNER OF SAID PROPERTY, UNDER 21 U.S.C. §  
881 (a) (4) and § 881 (a) (7).

2. WHETHER WHEN A SHOWING IS MADE THAT THE FORFEITURE OF THE  
ABOVE-DESCRIBED PROPERTY IS EXCESSIVE, THE GOVERNMENT MUST THEN  
SHOW THAT THE INTEREST ORDERED FORFEITED, NAMELY, THE ABOVE-  
DESCRIBED PROPERTY, IS NOT SO GROSSLY DISPROPORTIONATE TO THE

OFFENSE COMMITTED BY RICHARD LYLE AUSTIN, THE OWNER OF SAID  
PROPERTY, AS TO VIOLATE THE EIGHTH AMENDMENT AND THE CRUEL AND  
UNUSUAL PUNISHMENT CLAUSE AND EXCESSIVE FINES CLAUSE CONTAINED  
THEREIN.

PARTIES INVOLVED

In addition to the parties appearing in the caption of this  
case, Richard Lyle Austin, the Owner of the above-described  
property, is also a party in this matter.

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#### LOWER COURT DECISIONS

The United States District Court for the District of South Dakota granted the Government's Motion for Summary Judgment by its Order dated April 8, 1991. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's Order in its Decision, dated May 20, 1992. The United States Court of Appeals for the Eighth Circuit denied the Petition for Rehearing and the Suggestion for Rehearing En Banc by its Order dated July 2, 1992. Copies of all of these Orders or Decisions are included in the Appendix.

#### JURISDICTION

1. The Decision of the United States Court of Appeals for the Eighth Circuit was filed on May 20, 1992; and the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was filed on July 2, 1992.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. This Petition for Certiorari is filed within 90 days after the entry of the Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

#### STATUTES INVOLVED

The statutes involved in this case are the following: 21 U.S.C. § 881 (a) (4) and 21 U.S.C. § 881 (a) (7). They provide in pertinent part as follows:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or

concealment of property described in paragraph (1), (2), or (9) . . . .

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, . . . .

#### STATEMENT OF THE CASE

Richard Lyle Austin, the Owner and Claimant in this case, is the owner of an auto body shop known as the Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota; and he is also the owner of a 1972 HMET mobile home, Serial Number 0356509G, which is located at 302 Dows Street in Garretson, South Dakota, and which is Austin's home. In this case, the Government contended that both the body shop and the mobile home were used to facilitate an illegal drug transaction; and, therefore, the Government sought forfeiture of Austin's auto body shop and his 1972 HMET mobile home, pursuant to 21 U.S.C. § 881(a) (4) and § 881 (a) (7). The Government invoked jurisdiction of the District Court pursuant to 28 U.S.C. § 1345 and § 1355. The District Court granted the Government's Motion for Summary Judgment and entered a Decree of Forfeiture in regard to the Defendant property. Austin appealed the Court's Order Granting Motion for Summary Judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court in an opinion filed on May 20, 1992. The United States Court of Appeals for the Eighth Circuit subsequently denied a Petition for Rehearing and Suggestion for Rehearing En Banc on July 2, 1992.

The 1972 HMET mobile home is larger than 240 square feet, measuring at the base thereof; and it is registered in South Dakota. The mobile home is valued at approximately \$3,000.00. Austin described the mobile home as his homestead, "because I use it as my home." Although Austin was incarcerated in the South Dakota State Penitentiary at the time of the appeal, he intended to return to the mobile home after he was released from the penitentiary.

The Garretson Body Shop is Austin's "business and . . . (his) livelihood." The body shop is Austin's only means to earn a living at this time. Austin has been in the auto body business for approximately twenty-five years, and he intends to live in Garretson and work at the body shop when he is released from prison. The body shop is valued at approximately \$33,600.00.

The Affidavit of Donald Satterlee, attached to Plaintiff's Motion for Summary Judgment, indicated that on June 13, 1990, Keith Allen Engebretson drove to the Garretson Body Shop, located at 508 Depot Street, in Garretson, South Dakota, to purchase one gram of cocaine. The Affidavit also indicated that Keith Engebretson went into the Body Shop and transacted a deal with Richard Lyle Austin, owner and manager of the Body Shop, for cocaine. Satterlee's Affidavit then indicated that, "Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509G, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith Engebretson at the body shop, and exchanged two gram of cocaine for an unknown amount of money." In Satterlee's Affidavit in Support of Search

Warrant, however, Satterlee stated that, "the Defendant then went from the Body Shop to his trailer, came back and met Keith Engebretson at the Body Shop, and exchanged one gram of cocaine for an unknown amount of money." Further, Donald Satterlee did not state specifically in either affidavit that Austin "had retrieved the cocaine from his trailer home;" but Satterlee stated in his Affidavit that, "Austin then went from the body shop to his trailer, . . . came back and met Keith Engebretson at the body shop, and exchanged two gram of cocaine for an unknown amount of money." Austin stated in his Affidavit that no money was given to him by Keith Engebretson in the Garretson Body Shop on June 13, 1990.

On June 14, 1990, a search warrant was obtained by means of Satterlee's first Affidavit, and a search of the said Body Shop and mobile home was conducted. As shown by the Return of Search Warrant and Inventory, a small amount of white powder paraphernalia and currency were found in the Claimant's mobile home. Officers also found in the shop safe in the Body Shop \$3,300.00 in cash and an H & R .22 caliber revolver. Austin stated in his Affidavit that the revolver was filled with bird shot when it was seized; and that he only used the gun to shoot sparrows in his body shop. The officers also found a small amount of drugs and paraphernalia in a desk drawer in the body shop.

Austin was subsequently indicted on one count of Possession of a Controlled Drug, one count of Maintaining a Dwelling House for Keeping or Selling Drugs, one count of Possession of Controlled Drug with Intent to Distribute, and one count of

Possession of Less than One Ounce of Marijuana. On October 23, 1990, Austin pled guilty to one count of Possession of Controlled Drug With Intent to Distribute, and the other three counts were subsequently dismissed. On January 28, 1991, Austin was sentenced to seven (7) years in the South Dakota State Penitentiary on that one count of Possession of Controlled Drug With Intent to Distribute, as indicated in the Judgment and Sentence, dated January 28, 1991.

On September 7, 1990, a Verified Complaint and Affidavit were filed by the Government, alleging that the above-described property was used to facilitate an illegal drug transaction and was thereby subject to forfeiture under the appropriate statutes. Notice of the action was given to Austin on September 11, 1990; and on September 21, 1990, Austin filed his claim alleging ownership of the above-described property. On October 11, 1990, Austin filed an Answer denying the allegation of the Plaintiff and asserting certain affirmative defenses. Austin has never admitted that the Defendant property was used to commit or to facilitate the commission of an illegal drug transaction.

In his deposition and his Answers to Interrogatories, Austin invoked his Constitutional right under the Fifth Amendment of the United States Constitution to remain silent when asked questions which may incriminate him in regard to criminal proceedings. Both the deposition and the Answers to Interrogatories were given prior to Claimant's sentencing on January 28, 1991. Austin did not admit that his mobile home or his body shop had been used to

store, conceal, complete a sale of drugs, or arrange a completion of a sale of drugs.

The Government moved for Summary Judgment; and Austin responded to the Motion appropriately. By its Order, dated April 8, 1991, the District Court granted the Government's Motion for Summary Judgment. Austin subsequently filed his Motion to proceed in forma pauperis, which was granted; and then Austin filed his Notice of Appeal. The Court subsequently entered a Decree of Forfeiture in regard to the Defendant property.

The Eighth Circuit Court of Appeals affirmed the District Court's Order granting Summary Judgment on May 20, 1992; and the Eighth Circuit Court of Appeals denied the Suggestion for Rehearing En Banc and the Petition for Rehearing on July 2, 1992.

#### ARGUMENT

This case involves an issue of grave Constitutional dimension and exceptional public importance, namely, whether the concept of proportionality arising from the Eighth Amendment to the United States Constitution and set forth in Solem vs. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) and United States vs. Bushner, 817 F.2d 1409 (9th Cir. 1987), should be applied to a civil forfeiture case under 21 U.S.C. § 881 (a)(4) and § 881 (a)(7), and whether when a showing is made that a forfeiture may be excessive, the government must show that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment, and the cruel and unusual punishment clause and excessive fines clause contained therein.

The Court is referred to United States vs. Halper, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989), in which the United States Supreme Court considered whether a civil penalty may constitute "punishment" for double jeopardy analysis. The Court stated, at 104 L.Ed.2d 501, that, "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purpose of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." 104 L.Ed.2d, at 501. ". . . it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 104 L.Ed.2d, at 502.

The Second Circuit Court of Appeals in U.S. vs. Certain Real Property and Premises Known As 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29 (2nd Cir. 1992), applied the rationale of U.S. vs. Halper, supra, to 21 U.S.C. § 881 (a) (7), and ruled that "Where the seized property is not itself an instrumentality of crime, however, and its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttal presumption that the forfeiture is punitive in nature." 954 F.2d, at 36. The Court stated, in quoting other cases, that, "(for Eighth Amendment purposes, 'there is no substantial difference between an in rem

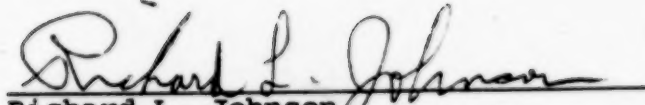
proceeding and a(n in personam criminal) forfeiture proceeding brought directly against the owner')." 954 F.2d, at 36. The Court further stated that, "While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the 'war on drugs' on the shoulders of every individual claimant. This is particularly so where the individual claimant's violations are relatively minor." 954 F.2d, at 37.

Although the Second Circuit Court of Appeals ultimately decided against the owner and claimant in that case, the case stands for the rule that the Eighth Amendment can apply to civil forfeiture cases. The Eighth Circuit Court of Appeals should have applied the rationale of the above-listed cases and held that the Eighth Amendment proportionality analysis does apply in the instant case. The panel in this case was obviously troubled by the disproportion between the property seized and Richard Austin's offense. The Court felt that the government had gone too far in this case but felt constrained to affirm the District Court. Application of the above cases should allow the application of the Eighth Amendment to this case.

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for Certiorari.

Dated at Sioux Falls, South Dakota, this 2<sup>nd</sup> day of

September, 1992.

  
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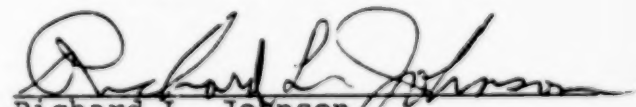
CERTIFICATE OF SERVICE

Richard L. Johnson, the undersigned attorney, hereby certifies that on the 29th day of September, 1992, he served two true and correct copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, Motion to Proceed In Forma Pauperis on Petition for Certiorari, and Affidavit in Support of Motion to Proceed in Forma Pauperis on Petition for Certiorari on the Attorney General of the United States and on Mary T. Wynne, Assistant U.S. Attorney, by mailing the same to them at their respective post office addresses as listed below:

Attorney General of United States  
Main Justice Building  
10th & Constitution Avenue, N.W.  
Washington, D.C. 20530

Mary T. Wynne  
Assistant U.S. Atty.  
P.O. Box 1073  
Sioux Falls, S.D. 57101

Dated at Sioux Falls, South Dakota, this 29th day of September, 1992.

  
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